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No. 92-297

IN THE
# Supreme Court of the United States
OCTOBER TERM, 1992

JEFF KOONS,
*Petitioner,*
*vs.*
ART ROGERS and SONNABEND GALLERY, INC.,
*Respondents.*

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

## MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF OF NATIONAL ARTISTS EQUITY ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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## MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

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National Artists Equity Association respectfully moves for leave to file the accompanying brief as *amicus curiae* in support of Petitioner Jeff Koons. Petitioner and Respondent Sonnabend Gallery, Inc., through their respective counsel of record, have consented to the filing of this brief. Respondent Art Rogers, through his counsel of record, has declined his consent.

National Artists Equity Association (NAEA) is a nonprofit organization with approximately 5,000 members nationwide. Its membership is made up of professional visual artists who work in numerous fields and media, including painting, printmaking, sculpture, and photography. Since its founding in 1947, NAEA has worked to further the aims of visual artists and to address their legal and professional concerns.

This case involves a delicate balance between two important rights, each of which is of critical concern to the members of NAEA. On the one hand, the copyright laws vest in the creators of original works, including works of visual art, certain rights to prevent their copying. Balanced against those property rights are the fundamental rights of artists to comment upon and criticize the world around them. Since the beginning of this century, such creative expression has often included references to symbols and imagery from the popular culture in which they live and work.

The decision of the Court of Appeals for the Second Circuit, while purporting to protect copyrights, failed even to address the significant interest in free expression reflected in the fair use doctrine, and in prior cases that have recognized a defense to infringement actions in cases involving comment and criticism. Its ruling has already had a profound chilling effect on visual artists, who now fear that the common practice of referencing existing images in their work will expose them to liability for copyright infringement

NAEA respectfully submits that the attached brief in support of the petition will provide the Court with additional information regarding the artistic tradition of which Petitioner's work is a part, as well as the chilling effect of a rule, such as that promulgated by the Second Circuit, that would require visual artists to license rights in images that they reference as a condition to their criticizing or commenting on such images. The interests of NAEA and its members would not otherwise be adequately presented by the parties to this case.

For the foregoing reasons, NAEA respectfully requests that the Court grant it leave to file the attached brief *amicus curiae*.

Dated: September 11, 1992.

Respectfully submitted,

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NATIONAL ARTISTS EQUITY
ASSOCIATION

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# BRIEF *AMICUS CURIAE*

## INTEREST OF *AMICUS CURIAE*

The interest of *amicus curiae* National Artists Equity Association is as set forth in the preceding motion for leave to file this brief in support of the petition for a writ of certiorari.

## INTRODUCTION

The central question presented by the petition in this case is whether significant works of artistic expression that reference existing copyrighted works in order to criticize or comment upon those works, or upon society generally, may be deemed infringing, notwithstanding explicit protections for commentary and criticism set forth in the fair use provision of the Copyright Act, 17 U.S.C. § 107.

The Court of Appeals for the Second Circuit found such referential art to be infringing *as a matter of law*, without any inquiry into whether the primary nature of the challenged work was by way of artistic expression, rather than commercial exploitation, and notwithstanding the Court's explicit finding that Koons' sculpture was "a satiric critique of our materialistic society." 960 F.2d at 310. In so holding, the Court of Appeals ignored the clear language of the Copyright Act, and the prior teachings of this Court with respect to the value of artistic expression.

This Court has long recognized that the ultimate purpose of the copyright laws is to serve "the cause of promoting broad, public availability of literature, music and other arts." *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975) (Stewart, J.). If the law's "ultimate aim is to stimulate artistic creativity for the public good," *id.*, the decision of the Court of Appeals has seriously impeded that aim. Indeed, the Second Circuit's opinion is already having a

profound chilling effect on the creation and exhibition of an important genre of contemporary artistic expression.

## STATEMENT

*Amicus Curiae* National Artists Equity Association is an organization that represents some 5,000 visual artists throughout the United States. Its members care deeply about the copyrights they hold in their original works. At the same time, the artists of this country dearly value their right to speak out through their work on important issues, and to express critical views regarding the world around them.

### A. The Artistic Tradition At Issue In This Case

An important function of the arts — and particularly modern and post-modern arts — is to comment on the modern world, including the images and symbols and language that form our popular culture. Since the beginning of this century, referential art — art that references and comments upon existing imagery — has played a seminal role in the ongoing dialogue about what "art" means, and its role in a modern (or post-modern) world.

In addressing the dispute between Jeff Koons and Art Rogers — and the importance of a rule of law that allows legitimate artists to comment critically on existing imagery from the culture around them — it is vitally important to understand the role that referential work has played in twentieth century modern and post-modern art. "Modernism" is a movement that began in the last half of the nineteenth century and thrived in the first half of the twentieth. *See generally Modern Art and Modernism: Rethinking Representation* (F. Frascina & C. Harrison eds. 1962). According to Clement Greenberg, the leading scholar and critic of late modernism, it was a purist movement that derived many of its tenets from romantic notions of creation. *See* C. Greenberg, *Modernist Painting*, in *Modern Art and Modernism, supra*. "Late modernism distinguished between good and bad art by demanding that good art be pure, self-critical, original, sincere and serious." Note, *Post-Modern Art and*

*the Death of Obscenity Law*, 99 Yale L.J. 1359, 1363 (1990); *see* C. Greenberg, *American-Type Painting*, in *Modern Art and Modernism, supra*.

In the 1920s, Marcel Duchamp mounted a frontal assault on modernism (and, in the process, turned the art world on its head) by importing commonplace objects and images into what were traditionally "artistic" contexts. By displaying banal "found" items from the popular culture in gallery and museum settings, he forced the viewer to confront questions about what separates "art" from the myriad of images and objects that surround us in our everyday lives. Duchamp's exhibition of common, and often vulgar, objects as art enraged many. His *Fountain, see* Appendix A, first exhibited in 1917 (under the pseudonym R. Mutt), was no more or less than a standard urinal from a plumbing supply house, placed on a pedestal. *See* A. Schwartz, *The Complete Works of Marcel Duchamp* at 521 (1969); W. Camfield, *Marcel Duchamp: Fountain* (1989). Commenting upon the work's exclusion from an important exhibition, Duchamp wrote that he "took an ordinary article of life, placed it so that its useful significance disappeared under the new title and point of view — created a new thought for that object." R. Mutt (M. Duchamp), *The Richard Mutt Case* at 5 (1917). Despite the contemporaneous reaction to Duchamp's "readymades" (as they came to be known), it is clear that they became "vehicle[s] for some of the most tendentious and longest-burning intellectual debates in this society." K. Varnedoe & A. Gopnik, *High & Low: Modern Art and Popular Culture* 278 (1990) (hereinafter *High & Low*).

In 1919, Duchamp again enraged the established art world by displaying *as art* a small mechanical reproduction of Da Vinci's Mona Lisa, to which he had added a pencil mustache and goatee. *See* Appendix B. Once again, his attempt was to question then prevailing romantic notions of "art" and creation and, once again, his "borrowing" and defacing a well-recognized icon was unpopular. Over time, it has become

one of the most important examples of an artistic tradition that continues to this day.

The "Pop Art" movement of the 1960s and 1970s was, in a real sense, a continuation of the post-modern dialogue begun by Duchamp. *See* C. Tomkins, *The Bride and the Bachelors: Duchamp, Tinguely, Cage, Rauschenberg, Cunningham* (1968); *High & Low, supra, passim*. By referencing images from "pop" culture, artists such as Roy Lichtenstein, Robert Rauschenberg and Jasper Johns once again demanded of their viewers that they confront difficult questions about the nature of art, and its place in an ever more visually complex society. They began to question, and to challenge, the solemnity inherent in late modern art by incorporating in their work images from the "pop" culture around them. Lichtenstein's cold, flat renditions of imagery (and dialogue) from comic books, *see* Appendices C-1, D-1, referenced a set of representational cliches known to his viewers, whether or not they recognized the specific sources for Lichtenstein's paintings. *See* Appendices C-2, D-2. Rather than parodying or commenting upon particular, well-known panels from the comics, Lichtenstein's work was — and remains — important as a commentary upon a genre. By transforming his source material through choices involving media, size, color and simplification of imagery, his became an important voice in the dialogue about art and mass culture.

*Painted Bronze II*, *see* Appendix E, is considered one of Jasper Johns' most important contributions to the debate concerning the nature of art, and its relation to imagery found in, and borrowed from, the popular culture. Johns was inspired to create the piece when an artist friend casually remarked that Leo Castelli (a famous art dealer) could sell beer cans, if that was all he had to sell. In response, Johns cast a pair of cans standing on a pedestal, and painted them (somewhat crudely) with the familiar and mundane "Ballantine Ale" logo. As with Duchamp and Lichtenstein,

John's expression was in the editing of popular icons, in their transformation, and in the very act of exhibiting them.

In the minds of many, the acme (or nadir) of referential art was achieved when, in the early 1960s, Andy Warhol exhibited mechanical enlargements of Campbell Soup can labels — images as familiar and banal as any that could be imagined. *See* Appendix F. One critic wrote that, in doing so, Warhol had "liquidated the century-old tension between the serious artist and the majority culture. R. Hughes, *The Rise of Andy Warhol*, in *Art After Modernism: Rethinking Representation* at 54 (B. Wallis ed. 1984). Whatever one may think of Warhol's soup cans, or of Lichtenstein's comic-strips lifted from a widely recognized genre of familiar imagery, there can be no question that such expression played an important part in a valid and valuable creative dialogue.

That dialogue continues to this day. In the 1980s, theories of modernism and post-modernism were debated in the fields of art, architecture, music, literature and even legal scholarship. Among visual artists, the dialogue continued (and continues) to center around questions regarding originality, and is manifest in schools of art that continue to reference "found" images from the popular culture.

In 1990, the Museum of Modern Art in New York mounted an exhibition, entitled "High & Low," that explored the artistic tradition described briefly above. The show, which traveled to Chicago and Los Angeles, was widely hailed as one of the most important of the decade. In an accompanying book of the same name, Kirk Varnedoe, curator of paintings and sculpure at the Museum of Modern Art and the curator of the show, surveyed what he referred to as "one of the most important movements of the twentieth century." *See High & Low, supra*. The show began with the work of Marcel Duchamp. It ended with Jeff Koons.

**B. Jeff Koons**

As noted by both the trial court and the Court of Appeals, Jeff Koons is an internationally known and highly controversial artist. His work has been exhibited in one-man shows throughout the country, and he is represented in the most prestigious museums and collections in the world. Koons' work has been the subject of innumerable books, catalogs, and articles.

The controversy surrounding Jeff Koons flows primarily from his "thumb-in-the-eye" approach to received models of artistic creation. Koons is perceived by many as a huckster, a salesman, a semi-professional celebrity. He has publicly eschewed romantic notions regarding the artist as divinely inspired creator working outside the realm of commerce, just as his work has eschewed modernist ideals of art as somehow divorced from banality and commonality. His work (and his views) have been characterized as profoundly cynical, and ultimately nihilistic, by some. *See* R. Hughes, *Nothing If Not Critical* at 123 (1990). Others have described his work as among the most daring, challenging and important of the 1980s. *See, e.g., High & Low, supra*, at 392-98. In short, Koons' work (and his personality) have inspired reactions from adoration to revulsion. They are virtually impossible, however, to ignore.

Koons first came to national attention in the early 1980s when, in the tradition of Duchamp (among others), he exhibited existing objects such as industrial vacuum cleaners. The "displaced" object was, by then, a venerable artistic genre; Koons took the next step by displaying objects that were "uncharged" — "they didn't have the thrill of the forbidden or the appeal of the overlooked, just the drudge-like presence of the ignored." *High & Low, supra*, at 393.

In 1986, Koons created what is probably his best-known sculpture, entitled *Rabbit*. *See* Appendix G-1. Starting with a cheap inflatable dime-store toy rabbit, *see* Appendix G-2, Koons exploded it to nearly four feet in size, and had it cast

in highly polished stainless steel. In one sense, *Rabbit* is no more than a slavish copy of a widely recognizable *type* of image from the pop culture. At first glance, it bears none of the "artistic" qualities upon which notions of romanticism or modernism rely; it does not reveal the "hand of the artist." In that, it is more in the tradition of Duchamp's exhibiting a ready made object. Upon closer inspection and reflection, *Rabbit* reflects a whole range of transformational, or "artistic," choices. Its size, and particularly its medium, evoke a response in the viewer that is vastly different from that experienced upon encountering the referenced toy. *Rabbit* is unquestionably funny. At the same time, its coldness and hardness, coupled with its intimidating, hovering presence, renders it ultimately horrifying. There is no question but that in creating *Rabbit*, Koons "copied" — in some sense — the dime-store toy. Yet, by transforming a "cute bunny" in the way he did, he added significantly to the discourse which has been at the heart of modern and post-modern art for more than half a century.

By 1988, Koons had completed a body of work, including the sculpture *String of Puppies*, that he exhibited at the Sonnabend Gallery under the title "Banality Show." The show was a sensation; applauded and reviled in the press and by the public. Kirk Varnedoe, curator of the Museum of Modern Art, has described it as follows:

> "In late 1988, Koons managed to do something that most people thought was no longer possible. He shocked them. . . . Koons' figurines were shocking because of the way they looked. They were nightmarish — devil dolls, in which the insipid language of the cartoons' over-accentuated contours and biscuit glazes was suddenly made hard and staring. The contours of each piece were as chubby as a Disney drawing, but glacially hard — like Muppets which had just seen the Medusa.

. . . .

> . . . The desire to make newly imagined things look vitiated and secondhand seemed to express a preference for death over life, and even in a weary time this remained shocking. . . . It is that same self-protecting morbidity, merged, in this case, with a cheerful entrepreneurial busyness and a strangely ingratiating humor, that radiated from all of Koons' work. For once, the word *postmodernism* seemed meaningful — dead on."

*High & Low, supra*, at 393-98. As with *Rabbit*, the twenty sculptures in the "Banality Show" were transformed versions of existing images from the popular culture. Some included well-known "pop" characters such as the Pink Panther, Michael Jackson and Odie (the dog from the *Garfield* comic-strip). Others referenced well-known images, transformed in such a way as to alter considerably the viewer's response. Yet others used as their source material images of a genre which was well-known and recognizable, although the *particular* images may not have been familiar. In that sense, the work was in the tradition of Lichtenstein, who relied on knowledge of a type of comic-strip art, rather than the particular comic-strip panel that he referenced.

*String of Puppies* was among this latter group of sculptures. It relied on and referenced an image of a *type* which was immediately recognizable. It challenged and satirized the sort of "charming," "cute," "romantic," "sentimental" picture with which we are all familiar, and which fills the racks of gift shops. As was true of *Rabbit*, the response evoked by *String of Puppies* is vastly different from that evoked by its source. Rogers' photograph — and other pictures of that ilk — inspire a sort of sentimentality; the viewer is likely to respond with such an emotion, and with little more. The photograph is flat, and playful; it is *real*. It evokes thoughts about real people and puppies, about the moments before and after the picture was taken. One need

not quarrel with the quality or the value of Rogers' photograph to admit that it is of a particular and recognizable *type*, intended to evoke a given response.

*String of Puppies* evokes an entirely different feeling in its viewers. It is *big*; it is garishly and unnaturally colored; it exists not in a real world, but completely out of context. The limbs of the subjects simply end where the pedestal on which it stands begins. The viewer cannot pretend, as with the photograph, that there is more outside the frame. These people, and their grotesque puppies, are all there are. Then there are the characters themselves, bizarre parodies of smiling people and playful puppies. They appear neither happy nor playful. The faces of the people are frozen in twisted expressions that might appear natural if one could consider the prior or subsequent moment, but that are reduced to the grotesque by Koons' editing. The puppies, once cute and playful, have become a string of mysterious electric blue puppy-like objects with flat white stylized noses. The hardness of the moment is matched by the hardness of the object. The people and their dogs are no longer soft and pliant — they have become as wooden as the material in which they are portrayed. Through his manipulation, Koons has transformed a genre of image in such a way as to comment upon it forcefully, and to require his viewer examine it anew. It is a cheeky and cynical brand of commentary, and one which may be thought to denigrate a type of imagery that many find pleasurable. But, in the end, that denigration is what shocks, and causes a response.

The preceding description of Jeff Koons' work, and of the tradition from which it finds context, is not intended to suggest that his oeuvre is any more deserving of fair use protection than any other. Neither is it intended to suggest that well-known artists are incapable of infringing copyrights, or that their activities are to be judged with any greater level of deference than those of lesser-known artists. If the creation of a work entails an act of legitimate artistic

expression, then, whether or not one approves of the work, the artist's right of expression ought at least to be balanced against the commercial exploitation rights vested in the creator of the underlying work.

One need not adhere to Koons' particular aesthetic in order to deem his work legitimate artistic expression, worthy of some measure of protection under fair use provision of the Copyright Act. One need only admit, unlike the Court of Appeals, that a jury presented with evidence about Koons' work and the tradition from which it derives *might* find that it constitutes an act of serious artistic expression. In light of the last seventy years of modern and post-modern art, it is impossible to conclude as a matter of law that Koons, in creating *String of Puppies*, did no more than copy Rogers' photograph for commercial purposes in an attempt to convert Rogers' expression for his own pecuniary gain.

## ARGUMENT

The tension between the two important societal values implicated in this case is manifest: On one hand, artists and authors must be protected with respect to their copyrights in original works, if the creation and dissemination of such works is to be encouraged. On the other hand, this nation's long-standing tradition of artistic freedom requires that artists be free to criticize and comment on the world and the culture around them, including imagery, language and other works which might themselves be protected.

Balancing two such important cultural values is, admittedly, a difficult task. Yet in the past, this Court has sought to strike that balance by respecting both "the interests of authors and inventors in the control and exploitation of their writings and discoveries on the one hand, and society's competing interest in the free flow of ideas, information, and commerce on the other hand." *Sony Corp. of America v. Universal City Studios, Inc.*,, 464 U.S. 417, 429 (1984).

In instances when those competing values have clashed head-on, this Court has given primacy to the societal interest

in creativity and free expression. Protection of a copyright owner's property rights is "a secondary consideration," *id.* (quoting *United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 158 (1948)), and subservient to "[t]he primary objective of copyright . . . [which] is to promote the Progress of Science and the useful Arts." *Feist Productions, Inc. v. Rural Telephone Service Co.*, 111 S. Ct. 1282, 1290 (1991). The fair use doctrine, in particular, provides an "equitable rule of reason," *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417, 448 (1984), the purpose of which is to "avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which the law is designed to foster." *Stewart v. Abend*, 495 U.S. 207, 236 (1990) (quoting *Iowa State University Research Foundation, Inc. v. American Broadcasting Cos.*, 621 F.2d 57, 60 (2d Cir. 1980).

Artists have long taken comfort, and felt some measure of security, in this Court's respect for the value of their creative expressions. Before the Court of Appeals' decision in this case was handed down (and widely publicized), professional artists and art students could fairly believe that their sincerity of purpose, and honest intent to comment on and criticize the world around them, would at least be considered in balancing their rights against the property rights of others. Since that decision was rendered, many artists working in this important genre have perceived that the rules have changed, that referential art is *always* dangerous, and that selling referential art for money is *per se* violative of the Copyright Act.

### A. The Second Circuit Erred In Holding As A Matter Of Law That Koons' Work Was A Copy Of Rogers' Photograph.

In holding as a matter of law that Koons' sculpture was a "copy" of Rogers' photograph within the meaning of the Copyright Act, the Court ignored compelling evidence on the question whether Koons' act of transformation was itself a

significant act of artistic expression such that his work could not fairly be characterized as a mere "copy," and adopted an approach which conflicts with that of other circuits, which have held that such decisions are particularly inappropriate for summary judgment. *See, e.g., Twentieth Century-Fox Film Corp. v. MCA, Inc.*, 715 F.2d 1327 (9th Cir. 1983).

With respect to the issue of copying, the Court indulged in an *ad hoc* examination of the superficial similarities of the two works — without making any allowances for their differences, or for the creative expression embodied in Koons' sculpture. There was no question that Koons' made a number of important artistic choices in the process of transforming the photograph into a sculpture, including the addition of unnatural colors, the changing and addition of certain props, the changing and distorting of scale, the choice of material and style of workmanship, etc. Neither was there any dispute that essential elements of Rogers' expression, such as color (or lack of color), light and shadow, contrast and background, were *not* used by Koons. Respected experts submitted affidavits in the trial court concluding that in no sense could Koons' sculpture be deemed substantially similar to Rogers' photograph. Nevertheless, the trial court concluded — without even troubling to view the sculpture — that there was no material fact issue "in light of the overwhelming similarity to the protected expression to the original work," and the Court of Appeals affirmed that finding.

The Court of Appeals erred by failing to consider the transformative process embodied in, and the expressive elements of, Koons' work. At the very least, a jury should have determined whether Koons copied Rogers' work in such a way as to convert to himself the value of Rogers' artistic expression, or whether he merely used the existing image as a jumping off place for his own artistic expression. The Court of Appeals' approach to the question of copying would render actionable much of the work of each of the artists discussed in the previous section. If courts were to have

focused solely on areas of similarity, and ignored critical differences (as well as critically different purposes), we might today be deprived of the products of an artistic tradition which has fostered valuable commentary, criticism and dialogue within our society.

### B. Koons' Work Is A Fair Use Of Rogers' Photograph.

Section 107 of the Copyright Act, 17 U.S.C. § 107, provides that the "fair use" of a copyrighted work "for purposes such as criticism [or] comment . . . is not an infringement of copyright." This Court has interpreted the fair use doctrine as a means of allowing artists to "use" prior works in the creation of valuable new works. *See, e.g., Harper & Row, Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 549-50 (1985). It bears repeating that the doctrine's very purpose is to avoid application of the copyright laws in such a way as might stifle the creativity which they were intended to foster. *Stewart v. Abend, supra*, 495 U.S. at 236.

In accordance with its open-ended purpose, the language of Section 107 is itself open-ended and inclusive. The statute instructs that fair use "*includ[es]* . . . use . . . for purposes *such as* criticism, comment, news reporting, teaching . . ., scholarship, or research." 107 U.S.C. § 107 (emphasis supplied). It goes on to direct that, in determining whether a particular use is fair, "the factors to be considered shall *include*" four enumerated factors, including (1) the purpose and character of the challenged work, and (2) the effect of the use upon the value of the copyrighted work. Professor Nimmer has noted that the statutory framework has an "almost infinite elasticity," 3 M. Nimmer & D. Nimmer, *Nimmer on Copyright* § 13.05[A][5] at 13-102.6 (1992).

The Second Circuit's categoric approach to Koons' fair use defense ignores the legislative mandate inherent in Section 107, and threatens seriously to chill the types of expression that the statute was intended to protect. As discussed below, the Court decided the first factor by focusing

exclusively on the fact that Koons sold three copies of *String of Puppies* for money. Having concluded from that fact that the purpose of the work was "primarily for profit-making motives," the Court then held *as a matter of law* that *String of Puppies* could not be fairly characterized as commentary or criticism. Finally, the Court concluded that future market harm to Rogers could be presumed based solely on its earlier finding that Koons' motive had been primarily commercial.

The import of the Second Circuit's holding is that the fair use doctrine will not serve to protect works of art that are sold because: (a) their purpose may always be deemed commercial; and (b) such commercial purpose creates a presumption of economic injury to the copyright holder. Such a result ignores the plain language of Section 107.

### C. Koons' Work Is In The Nature Of Creative Expression Rather Than Commercial Exploitation.

In an oft-repeated dictum, this Court has stated that the "crux of the profit/nonprofit distinction is not whether the sole motive of the use is monetary gain but whether the user stands to profit from the exploitation of the copyrighted material without paying the customary price." *Harper & Row, Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 562 (1985). On the facts of that case, the Court's statement served properly to balance the competing goals of the copyright scheme generally, and the fair use doctrine in particular. Its application to the facts of this case had the opposite effect.

*Harper & Row* involved the publication by *The Nation* magazine of excerpts from the unpublished memoirs of Gerald Ford, first-time publication rights in which had been licensed to *Time* magazine. This Court correctly noted that *The Nation* could have (but chose not to) bid for first-time rights. Instead, it purloined a copy of proofs of the book and "scooped" *Time* by publishing first. In rejecting *The Nation*'s argument that its primary motive was not

commerce, but news reporting, this Court used the "customary price" language quoted above.

In *Harper & Row*, this Court focused on evidence of practice in the publishing industry to supply the "custom" to which it referred. There is no such custom in the field of fine arts; certainly, none was evidenced in the record before the trial court. Thus, in the field of visual arts, the "customary price" concept becomes circular: Once a court decides that an artist's referential work is commercial (because he or she did not purchase rights), such uses are as a practical matter prohibited unless artists negotiate licenses from copyright holders.

If a "custom" of requiring payment for referenced images in the field of fine arts is created as a result of this case, it will significantly chill artistic expression. For, whereas magazine publishers can make economic decisions about whether to pay for first publication rights in copyrighted books, only a handful of artists are in a position even to consider purchasing rights in the material they criticize and comment upon. A few such artists — including Koons and Johns — may today be in a position to do so. But even those few were not always so situated; they might never have become the artists they are today if, when starting out (or while in art school), they had been required to purchase rights in the imagery they referenced and commented upon.

Moreover, such a rule would restrict the underlying works upon which artists may comment to those whose owners allow them to do so. In situations where an artist seeks to lampoon or criticize an existing work, it will be the rare case in which the holder of the copyright in the work consents — even for a fee. *See Fisher v. Dees*, 794 F.2d at 437 ("Parodists will seldom get permission from those whose works are parodied."). When rights can be purchased, the price may be expected to include some component representing a "criticism fee," notwithstanding the fact that the copyright laws are not intended to compensate copyright

holders for damage caused by critical commentary. *See Consumers Union Of the United States, Inc. v. General Signal Corp.*, 724 F.2d 1044, 1051 (2d Cir. 1983), *cert. denied*, 469 U.S. 823 (1984). In sum, the judicial creation of a "custom" requiring the purchase of a license as a condition to criticizing or commenting upon existing works is antithetical to the very purpose of the fair use doctrine, which is to encourage the free exchange of ideas through commentary and criticism.

### D. Koons' Work Is A Parody And Satire Of Rogers' Photograph, And Of Its Genre.

Courts have long recognized that affording satire and parody broad latitude as fair uses is "a means of fostering the creativity protected by the copyright law." *Warner Brothers, v. American Broadcasting Cos.*, 720 F.2d 231, 242 (1983); *see Fisher v. Dees*, 794 F.2d 432 (9th Cir. 1986); *Walt Disney Productions v. Air Pirates*, 581 F.2d 751 (9th Cir. 1978). Just as the drafters of Section 107 explicitly recognized the value of commentary and criticism, judges have treated parody and satire as art forms to be encouraged. *See, e.g., Elsemere Music, Inc. v. National Broadcasting Co.*, 482 F.Supp 741 (S.D.N.Y.), *aff'd*, 623 F.2d 252 (2d Cir. 1980).

The lower courts are in conflict as to whether parody qualifies for fair use protection only where that which is copied is itself the subject of the satire, or whether the defense applies as well to satires of general societal mores. *Compare, e.g., Walt Disney Productions v. Air Pirates*, 581 F.2d 751, 758 n.15 (9th Cir. 1978) (work referenced must be an "object of the parody") and *Metro-Goldwyn-Mayer, Inc. v. Showcase Atlanta Coop. Prods., Inc.*, 479 F.Supp 351 (N.D. Ga. 1979) (in order to qualify as parody, work must "make some critical comment or statement about the original work") *with Elsemere Music Inc. v. National Broadcasting Co.*, 482 F.Supp 741 (S.D.N.Y. 1980), *aff'd*, 623 F.2d 252 (2d Cir. 1980) ("issue . . . is whether the use in question is a valid

satire or parody, and not whether it is a parody of the copied [work]").

In this case, the Court of Appeals held that a challenged work qualifies for fair use protection only if the copied work is, "at least in part, an object of the parody." 960 F.2d at 310. It acknowledged that Koons worked in a tradition dating back to Duchamp that sought to incorporate common images "into works of art in order to comment critically both on the incorporated object and the political and economic system that created it," and explicitly conceded that *String of Puppies* "is a satirical critique of our materialistic society." 960 F.2d at 310. Yet, the Court of Appeals found that the parody/satire defense was inapplicable as a matter of law because it had "difficult[y] discerning any parody of the photograph 'Puppies' itself." *Id.*

In light of the Second Circuit's ruling, the applicability of the parody/satire defense is altogether unclear to innumerable artists whose work references imagery from the culture around them. Moreover, the Court's conclusion that Koons' work was not protected notwithstanding its conceded status as a satirical critique of our society is troubling, and is at odds with the conclusions of other courts. Finally, the Court's finding that it was "difficult to discern any parody of [Rogers'] photograph" is inappropriate on summary judgment, and almost certainly wrong as a matter of fact.

### E. Koons' Work Had No Effect On The Economic Value Of Rogers' Right To Exploit His Photograph.

Finally, the Court of Appeals took it upon itself to resolve a factual issue regarding the economic effect, if any, caused by Koons' use of Rogers' photograph. If, indeed, Koons' sculpture were found to have deprived Rogers of his economic rewards of authorship, such a finding might militate against a finding of fair use. But the evidence in that regard was, at best, conflicting and, in fact, provided a basis for finding that no such effect was reasonably likely to occur.

The evidence before the trial court took the form of conflicting affidavits concerning whether there was any established market for rights to make sculptural renditions of existing photographs such as Rogers'. The Court of Appeals found that it was "not implausible" that another artist would have been willing to purchase rights to produce a sculpture like Rogers' photograph, and that such a market had been reduced. 960 F.2d at 312.

The Second Circuit's approach was flawed in at least three critical respects. First, and most obviously, the court made factual findings, as is clear from its language. Second, and more fundamentally, the court departed from this Court's precedent, which requires a showing by "a preponderance of the evidence that some *meaningful likelihood* of future harm exists." *Sony Corp. of America v. Universal City Studios, Inc.*, *supra*, 464 U.S. at 451 (emphasis supplied). The reason for the rule is self-evident: "A use that has no *demonstrable effect* upon the potential market for, or the value of, the copyrighted work need not be prohibited in order to protect the author's incentive to create." *Id.* at 450 (emphasis supplied).

The Court of Appeals' "not implausible" test turns that rule on its head. A copyright owner may always be expected to hypothesize some way in which his or her work might conceivably have been exploited, and if the hypothesis is not overly "implausible," economic injury could always be found using the Court of Appeals' test. Such an approach, however, fails to respect the value of creative expression reflected in Section 107, and would do serious harm.

The Court of Appeals' approach also failed to recognize one of the essential attributes of parody and satire: Works that criticize or lampoon an underlying work rarely compete with them in the market, and thus rarely implicate the concerns of the copyright laws. *Consumers Union of the United States, Inc. v. General Signal Corp.*, 724 F.2d 1044, 1051 (2d Cir. 1983), *cert. denied*, 469 U.S. 823 (1984); *see* Light,

*Parody, Burlesque, and the Economic Rationale for Copyright*, 11 Conn. L. Rev. 615 (1979). To the extent that criticism may cause harm to an underlying work, such injury is not of the type protected against by the copyright laws. In *Fisher v. Dees*, 794 F.2d 432 (9th Cir. 1986), the Ninth Circuit stated:

> "Copyright law is not designed to stifle critics. . . . Accordingly, the economic effect of a parody with which we are concerned is not its potential to destroy or diminish the market for the original — any bad review can have that effect — but rather whether it *fulfills the demand* for the original. Biting criticism suppresses demand; copyright infringement usurps it."

794 F.2d at 437-38. There was simply no basis for the Second Circuit to conclude that Koons' sculpture usurped the market for anything that Rogers owned. If Rogers wishes to license others to make sculptural renditions of his photograph, he may do so. It is inconceivable that Koons' creation of idiosyncratic and grotesque parodies, which sold for more than $100,000 each, could interfere with Rogers' rights, or with the value of such a potential use.

## CONCLUSION

The opinion of the Court of Appeals for the Second Circuit has created great uncertainty with respect to the applicability of the fair use doctrine to works of visual art that comment upon or criticize existing imagery. As described above, referential art has played a vital role in the history of artistic expression in this century, and has been a catalyst for debate and dialogue in many creative disciplines. Visual artists have traditionally taken comfort in the protections afforded to such commentary and criticism by means of the fair use doctrine, and by the prior decisions of this Court. Such comfort has been destroyed by the promulgation of a rule that ignores the expressive value of the work being judged, and holds that art ceases to be art when it is sold.

The Court of Appeals has cast serious doubt on artists' abilities to create and sell important works of artistic expression, the value of which have long been explicitly recognized by this Court. A significant chilling effect is already being felt as a result of the lower court's widely-publicized decision, and will continue to be felt unless this Court reviews that decision on a writ of certiorari.

For the foregoing reasons, *amicus curiae* National Artists Equity Association respectfully submits that this Court should grant the petition for a writ of certiorari to the Court of Appeals for the Second Circuit.

Dated: September 11, 1992.

Respectfully submitted,

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NATIONAL ARTISTS EQUITY ASSOCIATION

# APPENDIX A

# APPENDIX B

L.H.O.O.Q.

# APPENDIX C

THAT'S THE WAY--IT SHOULD HAVE BEGUN! BUT IT'S HOPELESS!

THAT'S THE WAY--IT SHOULD HAVE BEGUN! BUT IT'S HOPELESS!
5

# APPENDIX D

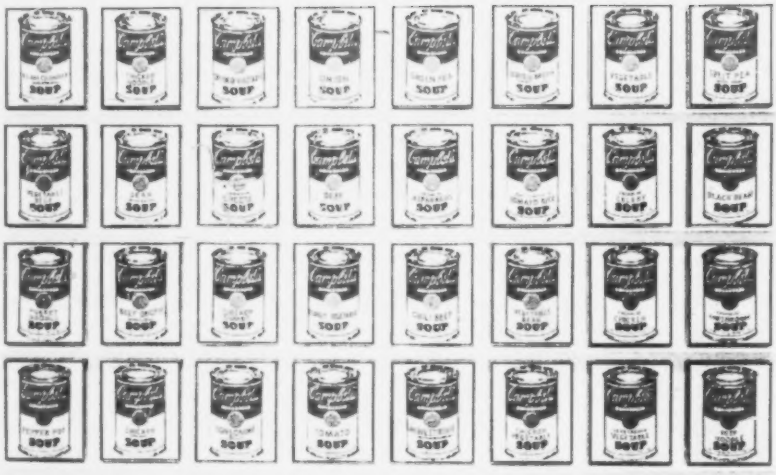
I DON'T CARE! I'D RATHER SINK -- THAN CALL BRAD FOR HELP!

RUN for LOVE!
I DON'T CARE IF I HAVE A CRAMP!— I'D RATHER DROWN— THAN CALL ANY ONE FOR HELP!

# APPENDIX E

BALLANTINE
XXX
ALE
BALLANTINE
XXX
ALE

# APPENDIX F


Campbell's
SOUP

# APPENDIX G